Supreme Court, U. S.
FILED
MAY 30 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1709

CLARK E. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In the Supreme Court of the United States

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No. .....

CLARK E. THOMAS,
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vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment and orders of the Supreme Court of Florida.

OPINIONS BELOW

The discharge of a jury of twelve, duly chosen and sworn to try a defendant for first degree murder, by the Circuit Court of the Ninth Judicial Circuit of Florida, Orange County, occurred on July 18, 1972, and the opinion is not reported. The judgment and sentence of the Criminal Court of Record for Orange County, Florida based on the verdict of a six man jury, adjudicating guilt of first degree murder and sentencing defendant to life imprisonment, occurred on September 24, 1972, and is not reported. The opinion and order of the Circuit Court of the Ninth Judicial Circuit of Florida, Orange County, denying defendant's Motion to Vacate and Set Aside Judgment of

Sentence and Conviction under Florida Criminal Procedure Rule 3.850 was entered on February 12, 1976, and is not reported. Defendant's appeal, In Propria Persona, to the District Court of Appeal for the Fourth District of Florida was dismissed on May 19, 1977, and is not reported, Petition for Rehearing and for Reinstatement of Appeal being denied on June 24, 1977, and not being reported. Defendant's Petition for Certiorari filed in the Supreme Court of Florida was dismissed on July 20, 1977, and is not reported, being reinstated on August 4, 1977, which opinion is not reported, Petition for Writ of Certiorari being denied on March 13, 1978, not being reported. The above judgments and orders of the respective courts are attached hereto as an appendix.

JURISDICTION

The order of the Supreme Court of Florida denying Petition for Writ of Certiorari was entered on March 13, 1978. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTION PRESENTED

Where the defendant was charged by Grand Jury indictment with first degree murder and proceeded to trial in the Circuit Court of the Ninth Judicial Circuit of Florida, a jury of twelve being impaneled and sworn, and discharged by the Court the following day, the defendant was subjected to double jeopardy in violation of the defendant's constitutional rights under the Fifth and Fourteenth Amendments when he was subjected to a second trial before six jurors for the identical offense in the Criminal Court of Record for Orange County, Florida.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without the just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA (1968)

Article One, Declaration of Rights, Section 9

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE

Defendant was charged in the Circuit Court for the Ninth Judicial Circuit of Florida, Orange County, on March 9, 1972, by indictment returned by a Grand Jury, with first degree murder in violation of Florida Statute Section 782.04, and at an arraignment on March 10, 1972, entered a plea of not guilty.

Jury selection began on July 17, 1972, and a jury of twelve, plus two alternates, was chosen, sworn, and placed in the jury box. (Transcript of excerpts of proceedings for July 17, 18, 1972, page 2). The jury was sequestered, and on the following day, July 18, 1972, was discharged by the Court upon reading in the newspaper of the decision of the Supreme Court of Florida in the case of *Donaldson* v. *Sack*, Fla., 265 So.2d 499, rendered on July 17, 1972, as a result of the decision of the Supreme Court of the United States in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, which held against the death penalty as provided under the Florida legislation then in effect, with a decision which became final on July 24, 1972. The Supreme Court of Florida found in its opinion that Circuit Courts in Florida no longer had jurisdiction in cases theretofore delineated as "capital" in those Florida counties having a Criminal Court of Record, and this decision also became final on July 24, 1972. (Transcript of excerpt of proceedings for July 18, 1972, pages 8, 18).[1]

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1. The opinion in *Donaldson* v. *Sack*, revealed at page 501 of the decision that the Plaintiff had been indicted for murder in the first degree but immediately prior to the commencement of the scheduled trial had moved to dismiss or transfer his case to the Criminal Court of Record on the ground that by reason of the decision in *Furman* v. *Georgia*, that the Circuit Courts in Florida in counties having Criminal Courts of Record lacked jurisdiction. The Supreme Court of Florida issued a Writ of

(Continued on following page)

Upon direct information filed in the Criminal Court of Record for Orange County charging the identical offense under the same statute as had been contained in the indictment in the Circuit Court wherein a twelve man jury had been impaneled and sworn, and then discharged, the Petitioner, Thomas E. Clark, was subjected to a second trial. Following the selection of a six man jury, a verdict of guilty was returned on September 24, 1972, and the defendant adjudicated guilty of murder in the first degree and sentenced to life imprisonment.

The defendant, *In Propria Persona*, filed a Rule 3.850 Motion to Vacate and Set Aside the Judgment of Sentence and Conviction on December 19, 1975, upon a claim of double jeopardy in that the case had proceeded to trial in the Circuit Court wherein a jury had been impaneled and discharged and that the trial in the Criminal Court of Record before a six man jury constituted double jeopardy and violated defendant's constitutional rights, which motion was denied on February 12, 1976, with prejudice, whereupon the defendant, *In Propria Persona*, thereupon timely filed a Notice of Appeal to the District Court of Appeal, Fourth District of Florida, which Appeal was dismissed on May 19, 1977, and a rehearing denied on June 24, 1977. Defendant then timely filed a Petition for

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Footnote continued—

Prohibition to prohibit the Circuit Judge from proceeding with the trial in the Circuit Court. In the case of *Laster* v. *Stephenson*, Fla., 268 So.2d 387, where the defendant was tried for a capital offense by a jury verdict rendered on July 17, 1972, it was determined that the Circuit Court had jurisdiction on July 17, 1972; that *Donaldson* v. *Sack*, although decided on July 17, 1972, was not immediately effective and did not become effective until July 24, 1972, and that Laster was properly tried and convicted in the Circuit Court for murder in the first degree but that the cause should be transferred to the Criminal Court of Record in the county for imposition of sentence since *Furman* v. *Georgia*, merely declared that the death penalty could not be imposed under the Florida statute then in effect.

Certiorari in the Supreme Court of Florida which was erroneously dismissed sua sponte, subject to reinstatement if timeliness was established on proper motion, which was thereafter filed and Motion for Reinstatement granted on August 4, 1977. On March 13, 1978, the Supreme Court of Florida denied the Petition for Writ of Certiorari. The constitutional question of double jeopardy thus presented and first raised at trial was thereafter preserved throughout all steps of the appellate procedure.

ARGUMENT

The Fifth Amendment's proscription against placing a person in jeopardy twice for the same offense has been applied to the states through the Due Process Clause of the Fourteenth Amendment and this application must be made retroactively. *Benton* v. *Maryland*, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; see *Price* v. *Georgia*, 1970, 398 U.S. 323, 331 n. 9, 90 S.Ct. 1757, 26 L.Ed.2d 300; *Ashe* v. *Swenson*, 1970, 397 U.S. 436, 437 n. 1, 90 S.Ct. 1189, 25 L.Ed.2d 469; *Waller* v. *Florida*, 1970, 397 U.S. 387, 391 n. 2, 90 S.Ct. 1184, 25 L.Ed.2d 435; *North Carolina* v. *Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656; *Galloway* v. *Beto*, 5 Cir. 1970, 421 F.2d 284, certiorari denied 400 U.S. 912, 91 S.Ct. 137, 27 L.Ed.2d 151.

Because "(t)he prohibition is not against being twice punished, but against being twice put in jeopardy," *United States* v. *Ball*, 1896, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300, it is necessary to determine when jeopardy attaches in a jury trial. In *Downum* v. *United States*, 1963, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100, the Supreme Court recognized that this occurs when the jury is impaneled and sworn, thus vesting the defendant with the valued right to have his trial complete before the tribunal

and that jury. See *Wade* v. *Hunter*, 1949, 336 U.S. 684, 689, 69 S.Ct. 834, 92 L.Ed. 974.

It has been repeatedly stated that in a jury case, jeopardy attaches when a jury has been impaneled and sworn. *Himmelfarb* v. *U. S.*, C.A. Cal. 1949, 175 F.2d 924, certiorari denied 90 S.Ct. 132, 396 U.S. 868, 24 L.Ed.2d 121; *Ex parte Glenn*, C.C. W.Va. 1901, 111 F. 257, reversed on other grounds 23 S.Ct. 851, 189 U.S. 506, 47 L.Ed. 921; *Serfass* v. *U. S.*, Pa. 1975, 95 S.Ct. 1055, 420 U.S. 377, 43 L.Ed.2d 265; *U. S. ex rel. Rogers* v. *LaVallee*, C.A. N.Y. 1975, 517 F.2d 1330, certiorari denied 96 S.Ct. 866, 423 U.S. 1078, 47 L.Ed. 2d 89; *U. S. ex rel. Webb* v. *Court of Common Pleas of Philadelphia County*, C.A. Pa. 1975, 516 F.2d 1034; *U. S.* v. *Sanabria*, C.A. Mass. 1976, 548 F.2d 1, certiorari granted 97 S.Ct. 2970; *U. S.* v. *Wilson*, C.A. Ky. 1976, 534 F.2d 76; *U. S.* v. *White*, C.A. Tex. 1975, 524 F.2d 1249, certiorari denied 96 S.Ct. 2629, 426 U.S. 922, 49 L.Ed.2d 375; *U. S.* v. *Kehoe*, C.A. Tex. 1975, 516 F.2d 78, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 1103, 424 U.S. 909, 47 L.Ed.2d 313, rehearing denied 96 S.Ct. 1687, 425 U.S. 945, 48 L.Ed.2d 189; *U. S.* v. *Llaca Orbiz*, C.A. Puerto Rico 1975, 513 F.2d 816, certiorari denied 96 S.Ct. 117, 423 U.S. 861, 46 L.Ed.2d 88, rehearing denied 96 S.Ct. 578, 423 U.S. 1039, 46 L.Ed.2d 415; *U. S.* v. *Glover*, C.A. N.Y. 1974, 506 F.2d 291; *McNeal* v. *Hollowell*, C.A. Miss. 1973, 481 F.2d 1145, certiorari denied 94 S.Ct. 1476, 415 U.S. 951, 39 L.Ed.2d 567; *Smith* v. *State of Miss.*, C.A. Miss. 1973, 487 F.2d 88, certiorari denied 94 S.Ct. 844, 414 U.S. 1113, 38 L.Ed.2d 740; *U. S.* v. *Sebastian*, D.C. N.Y. 1977, 428 F.Supp. 967; *McKay* v. *Raines*, D.C. Kan. 1975, 405 F.Supp. 363; *U. S.* v. *Frumento*, D.C. Pa. 1975, 405 F.Supp. 23; *Jones* v. *Anderson*, D.C. Ga. 1975, 404 F.Supp. 182, affirmed 522 F.2d 181, rehearing denied 525 F.2d 693.

Jeopardy attaches in a criminal trial when the jury has been selected and sworn even though no evidence has been taken. *Crim* v. *State*, Ind. App. 1973, 294 N.E.2d 822.

The factual situation to be here considered is unique, and no precedents will be found upon the same factual circumstances.

The defendant went to trial on a Grand Jury indictment for murder in the first degree in the Circuit Court, on Monday, July 17, 1972, and the first day of the trial was spent in picking a twelve man jury which was then impaneled, sworn, and sequestered for the night. By the following morning when the trial resumed on Tuesday, July 18, 1972, the presiding judge had learned from a newspaper article that the Supreme Court of Florida had rendered an opinion in the case of *Donaldson* v. *Sack*, 265 So. 2d 499, finding that by reason of the decision of the Supreme Court of the United States in *Furman* v. *Georgia*, 480 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, that the death penalty could no longer be imposed under the Florida legislation then in effect. The Supreme Court of Florida, in its opinion in *Donaldson* v. *Sack*, reasoned that by the ruling in *Furman* voiding capital punishment as then legislated, that there were no longer any "capital" cases, and that in those 17 counties in Florida having Criminal Courts of Record, all criminal cases should thereafter be tried before the Criminal Court of Record. In the remaining 50 of the 67 counties in Florida, the trials would continue in the Circuit Court.

In *Donaldson* v. *Sack*, the opinion revealed at page 501, that the trial of Sack for murder in the first degree had not yet begun, and the Court reasoned that the case should be transferred to the Criminal Court of Record, and that a Writ of Prohibition would issue to prevent trial in the Circuit Court, the decision becoming final on July 24, 1972 (the same date upon which *Furman* v. *Georgia* became final).

The trial of another first degree murder case begun on July 17, 1972, presented a somewhat different factual situation in *Laster* v. *Stephenson*, 268 So.2d 387. A jury was selected, impaneled and rendered its verdict finding Eddie James Laster guilty of manslaughter on July 17, 1972, whereupon the case was transferred to the Criminal Court of Record. The Appellate Court found no difficulty in the defendant being sentenced in the Criminal Court of Record after having been tried and found guilty in the Circuit Court on July 17, 1972. In a ruling on double jeopardy the Appellate Court found the proceeding in the Circuit Court to be with jurisdiction through July 24, 1972. The Court further concluded:

> "If the record showed that the court was about to retry Laster, prohibition would lie • • • It is obvious that Laster cannot be retried in that court because he has already been tried in a court of competent jurisdiction and found guilty of a lesser offense."

In the case *sub judice*, the Petitioner, Clark E. Thomas, proceeded to trial before a jury of twelve, impaneled and sworn on July 17, 1972, whereupon the presiding judge, *without declaring a mistrial*, discharged the jury and transferred the cause to the Criminal Court of Record (which did not then have jurisdiction per *Laster* v. *Stephenson*, supra). The defendant was then subjected to a second trial before a jury of six, found guilty, and sentenced to life imprisonment.

The discharge of the jury amounted to an acquittal since jeopardy had attached when the jury had been duly impaneled to try and determine the issue. *McNeal* v. *Hollowell*, C.A. Miss. 1973, 481 F.2d 1145, certiorari denied 94 S.Ct. 1476, 415 U.S. 951, 39 L.Ed.2d 567. Also to the same effect, see *Allen* v. *State*, 52 Fla. 1, 41 So. 593; *Burnes* v. *State*, 89 Fla. 494, 104 So. 783; *State ex rel. Cacciatore*

v. *Drumbright*, 116 Fla. 496, 156 So. 721, 97 ALR 154; *State ex rel. Landis* v. *Lewis*, 118 Fla. 910, 160 So. 485; *State ex rel. Dato* v. *Himes*, 134 Fla. 675, 184 So. 244, rehearing denied 135 Fla. 203, 184 So. 648; *State ex rel. Williams* v. *Grayson*, 90 So.2d 710, 63 ALR2d 777; *State ex rel. Wheeler* v. *Cooper*, 157 So.2d 875; *Adkins* v. *Smith*, 197 So.2d 865, certiorari discharged 205 So.2d 530. As long as the Circuit Court continued to have jurisdiction, the Defendant was entitled to trial by a twelve member jury as impaneled. *Furman* v. *Georgia*, supra, took away no substantive rights of the Defendant but merely declared that the punishment or penalty upon conviction could not be imposed under a Statute similar to that in Florida where the jury had discretion to determine the imposition of the death penalty.

Neither did *Donaldson* v. *Sack*, supra, take away any substantive rights to a twelve member jury as long as the Circuit Court had jurisdiction, but determined only that after *Donaldson* became effective at noon, July 24, the cause should be transferred to the Criminal Court of Record for the conclusion of the matter. As pointed out in *Laster*, *Donaldson* v. *Sack* did not authorize a retrial or new trial in the Criminal Court of Record. The proper procedure in the case *sub judice* would have been to proceed with the trial before the jury then impaneled to a final determination and rendition of a verdict. If found guilty, the case could be transferred to the Criminal Court of Record as in *Laster* for imposition of sentence. As pointed out in *Laster*, the Circuit Court had jurisdiction to complete the trial, and the adjudication of guilt or innocence was not thereby affected by *Furman* or *Donaldson*, only the maximum sentence which could be imposed.

The trial in both *Laster* and the case *sub judice* were begun in the Circuit Court on July 17, 1972. Laster was found guilty and thereafter sentenced after *Donaldson* became effective at noon, on July 24, by a transfer to the Criminal Court of Record for imposition of sentence. In the case *sub judice*, although the Circuit Court had jurisdiction, the jury was discharged with the legal effect of acquittal, since a retrial in the Criminal Court of Record amounted to double jeopardy. As pointed out in *Laster*, had the Criminal Court of Record proceeded to retry Laster, prohibition would lie "because he has already been tried in a court of competent jurisdiction".

In considering whether or not a holding of unconstitutionality has a retroactive effect, the Supreme Court of the United States, in *Linkletter* v. *Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731, determined that such holding of unconstitutionality does not operate retrospectively. In *Mapp* v. *Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 ALR2d 933, the Supreme Court had held that exclusion of evidence seized in violation of the provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment, and advised as to the retroactive effect:

> "This case presents the question of whether this requirement operates retrospectively upon cases finally decided in the period prior to Mapp. The Court of Appeals for the Fifth Circuit held that it did not, and we granted certiorari in order to settle what has become a most troublesome question in the administration of justice. We agree with the Court of Appeals."

In reasoning that the case should not have retroactive application, the Court concluded:

> "It was the judgment of this Court that changed the rule and the date of the opinion is the crucial date. * * * All that we decide today is that though the error complained of might be fundamental it is not of

the nature requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application."

In the later case of *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459, the Supreme Court of the United States in again refusing to apply a holding of unconstitutionality retroactively discussed *Linkletter* and *Mapp* v. *Ohio*, concluding that there would be no retrospective application.

The Supreme Court of the United States in *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772, when called upon to determine whether *Escobedo* and *Miranda* should apply retrospectively, again concluded that they should *not*, stating:

"In the light of these various considerations, we conclude that Escobedo and Miranda, like Mapp v. Ohio, supra, and Griffin v. California, supra, should not be applied retroactively."

In the case of the Petitioner herein, Clark E. Thomas, the presiding judge, in light of the controlling law as announced in *Laster* v. *Stephenson*, committed an error of law in discharging the jury rather than proceeding with the trial to verdict of the jury. If found guilty the case would then be transferred to the Criminal Court of Record for imposition of sentence after *Donaldson* v. *Sack* became effective on July 24, 1972.

In the case of *Fong Foo* v. *United States*, 369 U.S. 141, 7 L.Ed.2d 629, 89 S.Ct. 671, the court concluded the presiding judge committed an error of law in directing the jury to return a verdict of acquittal upon supposed improper conduct of an Assistant U. S. Attorney and lack of credibility in the testimony of witnesses for the prosecution

who had testified up to that point. The Court of Appeals granted a Petition for Writ of Mandamus, praying that the Judgment of Acquittal be vacated upon grounds that the trial court was without power to direct the Judgment of Acquittal in question; but the Supreme Court in its decision found that the acquittal was final and could not be reviewed, and that despite the error of law, that the defendant could not be put twice in jeopardy in violation of his constitutional rights.

In the case of Petitioner, Clark E. Thomas, although the presiding judge *did not declare a mistrial*, the defendant lost a valued right to trial before a twelve man jury, being thereafter subjected to double jeopardy at a second trial. Even if the presiding judge had declared a mistrial, there was no "manifest necessity" as first prescribed in *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 wherein Mr. Justice Story, in laying down the touchstone for determining when reprosecution may follow an aborted trial, after discharge of a jury, stated:

"To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes: and, in capital cases especially Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

In *Wade* v. *Hunter*, 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834, the test required was an "imperious necessity". In *Downum* v. *U. S.*, 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033, in refusing a second trial and finding double jeopardy, the Court could not find a "manifest necessity" for the discharge of the jury, finding:

"Harassment of an accused by successive prosecution or declaration of a mistrial so as to afford the prose-

cution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States*, supra (367 US 369). But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge* (CC Mass) 2 Gall 364, F Cas No 14858. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished; but against being twice put in jeopardy.' *United States* v. *Ball*, 163 US 662, 669, 41 L ed 300, 302, 16 S Ct 1192."

Gori v. *U. S.*, 367 U.S. 364, 6 L.Ed.2d 901, 81 S.Ct. 1523, in again reviewing when double jeopardy might apply upon mistrial and retrial, reviewed the controlling authority starting when *Perez*, supra, concluding a mistrial could be granted only if there is a "manifest necessity" for the act, or the ends of public justice would otherwise be defeated. In a separate opinion in that case, Mr. Justice Douglas observed:

> "While the matter is said to be in the sound discretion of the trial court, that discretion has some guidelines—'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.' Id. 336 US 690.
>
> To date these exceptions have been narrowly confined. Once a jury has been impaneled and sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistrial is ordered—absent a showing of imperious necessity. As stated by Mr. Justice Story in *United States* v. *Coolidge*, (CC Mass) 2 Gall 488, F Cas No 14858, the discretion is to be exercised 'only in very extraordinary and striking circumstances'."

In *Smith* v. *State of Mississippi*, 478 F.2d 88 (1973) the court again applied the rule of "manifest necessity" for the trial judge to declare a mistrial quoting *Perez* and proceeding to a determination of whether *Downum*, *Gori* or *Jorn* applied to a state murder conviction. In *United States* v. *Jorn*, 1971, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543, the trial judge was found to have abused his discretion in discharging the jury and declaring a mistrial to give witnesses who might incriminate themselves the right to consult with their attorneys. The Supreme Court found that such arbitrary action could not support a finding of "manifest necessity".

In *Illinois* v. *Somerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066, the Supreme Court again reviewed the foregoing decisions beginning with *Perez* and including *Gori*, *Hunter*, and *Jorn* stating:

> "The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *United States* v. *Jorn*, supra. Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy in the absence of some important countervailing interest of proper judicial administration. Ibid."

The Supreme Court of Florida found that the urgent or necessary reasons that justify the discharge of a jury after it has been impaneled and sworn are: (1) illness of the judge, the accused, or a juror requiring the absence of any of them from the court, or (2) the inability of the jury to agree on a verdict after deliberation, or (3) the consent of the accused himself. *State ex rel. Williams* v. *Grayson*, (Fla.) 90 So.2d 710, 63 ALR2d 777.

In the present case before this court, the Petitioner Thomas E. Clark, was deprived of a twelve man jury already sworn and impaneled, and the presiding judge, without any "imperious necessity" or "manifest necessity" discharged the jury, thereby effecting an acquittal of Thomas with the consequent second trial before a jury of six constituting double jeopardy.

CONCLUSION

For the foregoing reasons we respectfully conclude that the discharge of the jury impaneled and sworn was not a manifest necessity or imperious necessity, and that the defendant was thereafter subjected to double jeopardy in a second trial upon the same offense, and that by reason thereof this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT G. MURRELL
SAM E. MURRELL & SONS
Post Office Box 1748
Orlando, Florida 32802
Attorneys for Petitioner

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Robert L. Shevin, Attorney General, Attorney for Respondent, Tallahassee, Florida, this 24th day of May, 1978.

ROBERT G. MURRELL
Attorney

APPENDIX

PROCEEDINGS FOR JULY 17, 18, 1972, PAGE 18, 21 CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF FLORIDA:

Judge:

"That the defendant is remanded to custody and this case is transferred to the Criminal Court of Record in this County. This jury is discharged with thanks of the Court".

"Now as to these jurors, I am going to discharge the jury • • • and the jury is discharged."

"We will be in recess subject to call."

JUDGMENT AND SENTENCE OF THE CIRCUIT COURT OF RECORD FOR ORANGE COUNTY:

"You, CLARK E. THOMAS, now being before the Court, attended by your attorney, Fred A. Jones, and you having been tried and found guilty of murder in the first degree, the Court adjudges that you are guilty of said offense.

Done and Ordered in open Court at Orlando, Florida this 24th day of September, 1972, pursuant to Rule 1.670 R.C.P.

/s/ Claude R. Edwards
Judge of Said Court"

ORDER OF THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT.—ORDER DENYING DEFENDANT'S MOTIONS UNDER THE CRIMINAL PROCEDURE RULE 3.850:

"Defendants moved under Criminal Rule 3.850 for relief from their conviction of first degree murder. Trial was held before the undersigned as a Judge pro tempore, by appointment of the now-defunct Criminal Court of Record in and for Orange County, Florida. Verdict of guilty, adjudication and sentencing took place on September 24, 1972. The defendants were severally represented by aggressive able counsel. Defendants' post-trial motions, appeals, petition for certiorari and proceedings in the U.S. District Court have been unsuccessful. The instant motions filed jointly consist of some 35 pages of carefully hand-printed argument, facts and authorities. The motions, as nearly as the Court can determine, mount three stated principal attacks on the convictions and sentences: (a) Court lacked jurisdiction; (b) 6 'man' verdict was denial of due process and unconstitutional; (c) absence of preliminary hearing.

The facts are set out with apparent accuracy in the motion. This Court will not bore the movants or burden the record with a further recitation thereof.

It is fairly clear that petitioners gained some support for their position in *Laster vs. Stephenson,* (Fla. App.2 1972) 268 So. 2d 387.

Although the point is not raised directly in petitioners' motions, the main thrust of issues (a) and (b), supra, is that of double jeopardy. (e.g. If the Circuit Court had jurisdiction at the time the first jury was sworn, and a new trial in Circuit Court was

granted, double jeopardy would appear to attach.) The question of double jeopardy has been disposed of in the case of *Thomas vs. Massey,* Orlando Civil 74-230 in the United States District Court for the Middle District of Florida, Orlando Division, which opinion was filed and decided on January 15, 1975.

This Court would observe that *Laster* is merely an attempt by the intermediate appellate court, to deal with a knotty problem on a piece-meal basis. The question of how to accommodate due process with the utter confusion exhibited by the Justices and created by the decision in *Furman vs. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 32 L.Ed.2d 346 (1972) makes it difficult enough for members of the bar and bench to follow. As to the analysis by the movants of *Donaldson vs. Sack,* (Fla. 1972) 265 So. 2d 499, the Court would observe that the matters raised by movants have been dealt with in other decisions and may be said to lack essential merit primarily because of the effect of the word 'consistent' in the quotation from *Donaldson* in movants' motions at page 10.

The Court would further observe that at the time the convictions of the movants were affirmed by the Fourth District Court of Appeal (Certiorari Petitions to Supreme Court of Florida were dismissed) the *Laster* case had been published in reports and was available for counsel and the Fourth District Court of Appeal to consider.

The question of denial of a preliminary hearing is without substantial merit.

Accordingly, the motions of movants are hereby denied with prejudice.

This Court deplores a legal system which allows repeated appeals by those convicted in fair trials under due process of law, under the guise of various motions and under access to the Federal Courts, for the reason that the Courts are overburdened with the ordinary administration of justice in due course. This added burden obviously violates the rights of other citizens to a speedy and inexpensive determination of their cases by clogging the dockets of the Court. Nevertheless, the Court commends the movants for their determination and persistence and for their pained and painstaking analysis of *Donaldson* and for their attempts to use *Laster* as a springboard.

Movants are hereby advised that they have 30 days from the entry of this Order within which to appeal the same.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 11th day of February, 1976.

/s/ Claude R. Edwards, Circuit Judge
Claude R. Edwards, Circuit Judge"

DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA (STAMPED ON MOTION TO QUASH FRIVOLOUS APPEAL)

"CONSIDERED and GRANTED Appeal in Orange County Case No. 72-879 is Dismissed. 5/19/77 EJC. Emmett J. Comiskey, Clerk, Fourth District Court of Appeal".

ORDER OF THE DISTRICT COURT OF APPEAL ON REHEARING (STAMPED ON PETITION FOR REHEARING)

"CONSIDERED AND DENIED 6/24/77 EJC. Emmett J. Comiskey, Clerk, Fourth District Court of Appeal".

ORDER OF THE SUPREME COURT OF FLORIDA DATED JULY 20, 1977

"It appearing to the Court that the Petition for Writ of Certiorari was not timely filed, it is Ordered that the Petition is hereby dismissed sua sponte, subject to reinstatement of timeliness is established on proper motion *filed* within 15 days from the date of this Order. See Rule 4.5c(6), Florida Appellate Rules".

ORDER OF THE SUPREME COURT OF FLORIDA DATED AUGUST 4, 1977

"Petitioners Motion for Reinstatement is hereby granted".

ORDER OF THE SUPREME COURT OF FLORIDA DATED MARCH 13, 1978
CASE NO: 52-051

"This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the records deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5C(6), and it appearing to the Court that it is without jurisdiction it is so Ordered that the Petition for Writ of Certiorari be, and the same is hereby denied. Oberton, C.J., Atkins, Boyd, England & Hatchett, J.J., concur."

Supreme Court, U. S.
FILED
JUN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1709

CLARK E. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN,
Attorney General of Florida,

KENNETH G. SPILLIAS,
Assistant Attorney General of Florida,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1709

CLARK E. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The order of the Supreme Court of Florida denying Petitioner's Petition for Writ of Certiorari on March 13, 1978, is not reported. The order of the Fourth District Court of Appeal granting Respondent's motion to quash Petitioner's appeal as frivolous was entered on May 19, 1977 and is not reported. The order of the Circuit

Court of the Ninth Judicial Circuit denying Petitioner's Motion to Vacate is also unreported. These orders are contained in Petitioner's Appendix.

The order of the Florida Supreme Court denying Petitioner's Petition for Writ of Certiorari following the affirmance of his conviction on direct appeal is reported at 291 So.2d 11 (A 17)[1]. The decision of the Fourth District Court of Appeal affirming Petitioner's conviction is reported at 283 So.2d 909 (A 16).

The order of the United States District Court, Middle District of Florida, denying Petitioner's application for a Writ of Habeas Corpus is unreported but relevant portions of the order are excerpted and included in Respondent's Appendix (A 14, 15).

JURISDICTION

The order of the Supreme Court of Florida denying Petitioner's Petition for

---

[1]"A" followed by an appropriate page number refers to the Appendix to Respondent's brief.

Certiorari was entered on March 13, 1978. The Petition for Writ of Certiorari was filed on or about May 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the decision of the state courts denying Petitioner's 3.850 Motion to Vacate because the matter raised therein had already been determined on direct appeal and was therefore res judicata and not raisable in the Motion to Vacate is an adequate state ground precluding this Court's review of Petitioner's double jeopardy claim on its merits; and if not, whether the retrial of Petitioner under the circumstances presented constituted double jeopardy in violation of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for

a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without the just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA (1968)
Article One, Declaration of Rights, Section 9

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

RULE INVOLVED

Rule 3.850, Florida Rules of Criminal Procedure (1976), which was the applicable rules at the time Petitioner filed his Motion to Vacate provides in pertinent part:

> . . . A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that

> the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence . . .
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner . . .

STATEMENT OF THE CASE

Petitioner was charged in the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida on March 9, 1972, by indictment returned by a grand jury, with first degree murder in violation of Florida Statute 782.04.

Jury trial commenced with jury selection on July 17, 1972 and a twelve person jury was selected and sworn. The following day, July 18, 1972, the jury was discharged by the court because the court had heard the Florida Supreme Court had decided Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) on July 17, 1972, and the holding of the case was the Circuit Court

no longer had jurisdiction in "capital" cases because the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 had invalidated Florida's death penalty statute.

Petitioner was then charged with first degree murder by an Information filed in the Criminal Court and after a six person jury trial, he was convicted as charged and sentenced to life imprisonment.

Petitioner filed a direct appeal from his conviction and one of the points argued in his appeal was that he was entitled to be discharged because double jeopardy attached when the trial court dismissed the twelve man circuit court jury (A 9-13). Following the affirmance of his conviction by the Court of Appeal (A 16), Petitioner filed a Petition for Certiorari in the Florida Supreme Court which was denied (A 17). Petitioner also raised his double jeopardy

claim in a Petition for Writ of Habeas Corpus in the Federal District Court, where his position was also rejected (A 14).

On December 19, 1975, Petitioner filed a Rule 3.850 Motion to Vacate, again asserting his claim of double jeopardy. The trial court denied the motion (Petitioner's Appendix 2-4), whereupon Petitioner filed a notice of appeal in the Fourth District Court of Appeal. Respondent filed a Motion to Quash Petitioner's appeal as frivolous because the double jeopardy issue had previously been considered and ruled upon on direct appeal (A 1-15). The court granted the Motion to Quash, and Petitioner then filed a Petition for Certiorari in the Florida Supreme Court, which was denied on March 13, 1978.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the

Fourteenth Amendment, barred his prosecution in the Criminal Division of the Florida courts after the circuit court jury was discharged. Respondent maintains that the state courts properly granted Respondent's Motion to Quash the Appeal without reconsidering Petitioner's Double Jeopardy claim on its merits because the issue had been raised and decided on direct appeal.

It is well settled that the United States Supreme Court's review of a federal claim which stems from a state court judgment that rests on independent and adequate state grounds is precluded. Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). The purpose of this rule is to implement the policy that the United States Supreme Court review is intended to correct judgments, not to revise opinions; if the same judgment would be rendered by the

state court after the Supreme Court corrected its view of federal law, then the review would be nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed.2d 789, 65 S.Ct. 459 (1945).

In Parker v. North Carolina, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970) this Court held that where the state courts refused to consider the defendant's claim of racial exclusion in the composition of the grand jury because he had not challenged it at the proper time, this was an adequate state ground foreclosing Supreme Court review. Similarly, in Cousins v. Wigoda, 419 U.S. 477, 42 L.Ed.2d 595, 95 S.Ct. 541 (1975) the court held that where the state appellate court's judgment rejecting the defense of res judicata on the ground that it had not been pleaded and proved in the state trial court as required by state law constituted an adequate state ground that foreclosed any jurisdiction the

United States Supreme Court may possess to review the merits of the defense.

Applying the foregoing principles to the state courts' decision in the instant case, it is clear that the Petitioner is not entitled to this Court's consideration of his double jeopardy claim because his appeal was resolved on adequate state grounds by the courts below. Petitioner's double jeopardy claim was raised on direct appeal, and therefore under state law it was not a proper basis for collateral attack via a Motion to Vacate. Koedatich v. State, 287 So.2d 738 (3DCA Fla. 1974); Gore v. State, 260 So.2d 218 (1DCA Fla. 1972); Bright v. State, 257 So.2d 612 (3DCA Fla. 1972); Zide v. State, 253 So.2d 917 (3DCA Fla. 1971); State v. Bisendorfer, 244 So.2d 147 (4DCA Fla. 1971); Carter v. State, 242 So.2d 737 (1DCA Fla. 1970). The double jeopardy claim having been initially ruled on in Petitioner's direct appeal, was res judicata

at the time Petitioner raised it in his Motion to Vacate and therefore the state courts declined to reconsider the issue. Suarez v. State, 220 So.2d 442 (3DCA Fla. 1969); Culberson v. State, 224 So.2d 363 (2DCA Fla. 1969). Respondent submits therefore that this Court should decline to grant Petitioner's application for certiorari, because the Florida state courts have not decided a federal question of substance in a way not in accord with the applicable decisions of this Court, Rule 19(1)(a), Rules of the Supreme Court of the United States, rather they declined to review the double jeopardy claim on wholly independent and adequate state grounds.

Although it is Respondent's position that Petitioner is barred from consideration of his petition in its merits for the foregoing reasons, assuming arguendo that the court finds his petition should be considered on its merits, Respondent maintains the Petitioner was not placed

in jeopardy twice for the same offense in violation of the Fifth Amendment's proscription.

The transfer of Petitioner's case from the circuit court to the criminal court was occasioned by the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) which invalidated Florida's existing death penalty statute. The Furman decision was issued on June 29, 1972 and Petitioner's trial commenced on July 17, 1972. Before the trial, Petitioner had objected to the circuit court's jurisdiction, as all criminal offenses except capital crimes were tried in criminal court, and capital crimes were tried in circuit court. The fact of Petitioner's challenge to the court's jurisdiction was noted by the trial court (A 18-20). After the jury had been impaneled and sworn, the trial court learned of the Florida Supreme Court's decision in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972)

which was issued on July 17, 1972. The opinion in Donaldson v. Sack stated that due to the Furman decision:

> . . . there seems to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive "capital cases" do not have jurisdiction in those cases heretofore designated as "capital" and accordingly subsequent to Furman jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there . . . Id. at 501.

The trial court concluded that the Donaldson v. Sack decision was dispositive of the issue of the circuit court's jurisdiction, discharged the jury, and ordered the case transferred to the criminal court. Petitioner's counsel did not object at the time to the trial court's action.

In an appeal from another murder case, Laster v. Stephenson, 268 So.2d 387 (2DCA Fla. 1972), the Second District Court of Appeal of Florida held that the circuit courts of Florida did have jurisdiction to try what were formerly "capital" cases

until July 24, the effective date of Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). However, this decision is not controlling in Petitioner's case because it was the opinion of an intermediate court of appeal which is co-equal with the Fourth District Court of Appeal and factually the two cases are dissimilar. In Laster, the trial had been completed, resulting in the defendant's conviction on a lesser charge, and the circuit court proposed to have the case transferred to the criminal court for a retrial. In the instant case, the trial judge stopped the trial before any testimony was taken and transferred the case. As noted by the trial court sub judice, "Laster is merely an attempt by the intermediate appellate court to deal with a knotty problem on a piece-meal basis." (Petitioner's Appendix 3).

Although in discharging the first jury, the trial judge did not specifically use the word "mistrial" it is clear that a

mistrial was intended and the discharge of the jury was effectively a mistrial. The mistrial was ordered as a proper exercise of the trial court's discretion under the somewhat unusual circumstances of the instant case. The propriety of a mistrial order cannot be determined by a rigid formula. The court has set forth the general principles in Wade v. Hunter, 336 U.S. 684, 93 L.Ed. 974 (1949) that a trial can be discontinued when particular circumstances manifest a necessity for so doing and when failure to discontinue the trial would defeat the ends of justice. A trial court may order a mistrial if a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971).

In the instant case, the trial court concluded that under the cases of

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) and Donaldson v. Sack, 265 So.2d 499 (1972) it had no choice but to abort the trial because it lacked jurisdiction to try the Petitioner. Respondent submits the situation in the instant case is similar to that presented in Illinois v. Somerville, 410 U.S. 458 35 L.Ed.2d 425, 93 S.Ct. 1066 (1973). In that case, there was a fatal defect in the indictment charging the defendant which could only be remedied by dismissing the indictment so a proper one could be filed. The court held that the trial court's declaration of a mistrial was proper because it implemented a reasonable state policy and the defendant's interest in proceeding to a verdict was outweighed by the competing, important demand for public justice.

This Court recently held in Arizona v. Washington, ____ U.S. ____, 54 L.Ed.2d 717, 98 S.Ct. ____ (1978) that the trial

court's decision to grant a mistrial should be accorded respect, and where the record demonstrates that he has acted deliberately and within "sound discretion" in declaring a mistrial, this is sufficient to show the "high degree" of necessity required. The trial court sub judice acted within its discretion in ordering the jury discharged and transferring the case to criminal court. Furthermore, at the time, Petitioner concurred with the trial court's action and in fact it was Petitioner who initially suggested that the Furman decision precluded the circuit court from trying the case (A 18-20). This Court held in its recent decision in United States v. Scott, 46 U.S. Law Week 4653 (June 14, 1978) that in a situation where termination of a trial was sought by the defendant on grounds unrelated to guilt or innocence before the case is submitted to the trier of fact for a verdict double jeopardy does not apply.

Similarly, in the instant case, Petitioner acquiesced in the termination of the first trial prior to any testimony being taken so no determination of guilt or innocence was made.

Since it is evident the mistrial was not occasioned by prosecutorial or judicial overreaching and the Petitioner in fact initially suggested the trial court's action, retrial of Petitioner in the criminal court was not barred by principles of double jeopardy. United States v. Dinitz, 424 U.S. 600, 47 L.Ed.2d 267, 96 S.Ct. 1075 (1976); United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

LOUIS JOSEPH SPURLING and CLARK E. THOMAS, Appellants,	)	
v.	)	CASE NO. 76-683
STATE OF FLORIDA, Appellee.	)	

MOTION TO QUASH FRIVOLOUS APPEAL

Appellee, the State of Florida, by and through the undersigned counsel, respectfully requests that this Honorable Court quash the appeal in the above-styled cause. In support thereof, Appellee would show as follows:.

I

This is an appeal from the denial by the Criminal Division of the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida, of Appellant's Motion to Vacate, filed under Rule 3.850

of the Florida Rules of Criminal Procedure, Case No. 72-495.

II

Under the authority of Rule 3.9(b) of the Florida Appellate Rules, the above-styled cause should be quashed on the ground that the same is frivolous and therefore not properly before this Court.

III

It is Appellants' contention that the trial court erred in denying their Motion to Vacate made pursuant to Rule 3.850, Florida Rules of Criminal Procedure. It is Appellee's position that the trial court properly denied said motion, as the issue Appellants raised therein was previously ruled upon by this Court in Appellants' individual direct appeals before this Court. See Thomas v. State, 283 So.2d 909 (4DCA Fla. 1973), cert. denied, 291 So.2d 11 (Fla. 1974), and Spurling v. State, 282 So.2d 882 (4DCA Fla. 1973), cert. denied,

286 So.2d 11 (Fla. 1973). It is well established that points raised and disposed of on direct appeal cannot be the basis of a collateral attack via a motion to vacate. Koedatich v. State, 287 So.2d 738 (3DCA Fla. 1974); Gore v. State, 260 So.2d 218 (1DCA Fla. 1972); Bright v. State, 257 So.2d 612 (3DCA Fla. 1972); Zide v. State, 253 So.2d 917 (3DCA Fla. 1971); State v. Bisendorfer, 244 So.2d 147 (4DCA Fla. 1971); Carter v. State, 242 So.2d 737 (1DCA Fla. 1970).

IV

The sole issue Appellants presently bring before this Honorable Court for review is, in essence, whether Appellants were subjected to double jeopardy when they were charged on indictment in the Circuit Court with first degree murder and proceeded to have a twelve member jury selected, which was subsequently discharged, and Appellants were thereafter tried on the same charges by Information with a six

member jury in the Criminal Court of record. On direct appeal, each individual appellant, filing his own brief, presented the same issue to the Court. Attached and incorporated as Exhibits I and II respectively are conformed copies of the Assignment of Error and Argument relating to the point now raised for Appellants Thomas and Spurling respectively. As this Court has previously ruled on this issue for each appellant, Appellee contends that the previous determination and ruling made by this Court on this issue is res judicata. State v. Bisendorfer, supra.

Although Appellants have rephrased the issue presently before this Court from those which were initially determined on direct appeal, the doctrine of res judicata will nevertheless apply. It is judicially established that grounds raised from prior proceedings will be res judicata on subsequent points in collateral actions when the substance of the points is

identical. Suarez v. State, 220 So.2d 442 (3DCA Fla. 1969); Culberson v. State, 224 So.2d 363 (2DCA Fla. 1969). This "court should be spared the harassment of successive motions by the same prisoner containing repetitious grounds." Piehl v. State, 173 So.2d 723 (2DCA Fla. 1965); Riley v. State, 214 So.2d 767, 768 (2DCA Fla. 1968). Thus, it is Appellee's position that Appellants' instant issue should not be considered by this Court, and the instant appeal should be quashed. Grant v. State, 224 So.2d 721 (2DCA Fla. 1969).

V

Although Appellee realizes that a judicial ruling from a federal court is not binding on this Court, Appellee would show that the issue Appellants now raise was previously raised by Appellant Thomas in a federal Petition for Writ of Habeas Corpus. Said Petition was dismissed by order of the United States District Court,

Middle District of Florida, on January 15, 1975. Attached and incorporated as Exhibit III are conformed copies of Appellant's Petition and the Order of dismissal.

VI

Appellee files this motion in good faith and not for the purposes of harassment or undue delay in the timely disposition of the case sub judice.

WHEREFORE, in view of the foregoing discussion and authorities cited therein, Appellee respectfully requests this Honorable Court quash the appeal in the above-styled cause.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General
Tallahassee, Florida

/s/ Marsha G. Madorsky

MARSHA G. MADORSKY
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida

Counsel for Appellee

EXHIBIT 1

IN THE CRIMINAL COURT
OF RECORD IN AND FOR
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
vs.
LOUIS JOSEPH SPURLING
and CLARK E. THOMAS,

NO. 72-879

ASSIGNMENTS OF ERROR

COMES NOW the Defendant, CLARK E. THOMAS, by and through his undersigned attorney, and files this his Assignments of Error:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

* * *

15. That the Court erred in failing to discharge the Defendant as double jeopardy had attached due to the fact that previously in the Circuit Court, the jury had been sworn as to the Defendant, CLARK E. THOMAS, and

had been discharged which discharge was tantamount to an acquittal and Defendant should now be discharged.

* * *

POINT 1

1. WHETHER OR NOT THE TRIAL COURT ERRED IN FAILING TO DISCHARGE THE APPELLANT AFTER DOUBLE JEOPARDY HAD ATTACHED AT THE CONCLUSION OF THE CIRCUIT COURT CASE NO. 72-9 AFTER THE TRIAL JUDGE DISCHARGED THE SWORN AND IMPANELED JURY WITHOUT DECLARING A MISTRIAL.

ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE THE APPELLANT AFTER DOUBLE JEOPARDY HAD ATTACHED AT THE CONCLUSION OF THE CIRCUIT COURT CASE NO. 72-9 AFTER THE TRIAL JUDGE DISCHARGED THE SWORN AND IMPANELED JURY WITHOUT DECLARING A MISTRIAL.

Prior to the filing of this matter in the Criminal Court of Record in and for Orange County, Florida by direct Information, the Appellant had previously been indicted by the Orange County Grand Jury for the identical offense in the case of State v. Clark Thomas, Case No. 72-9, Orange County Circuit Court. Appellant was arraigned on March 10, 1972 (TM 1-4,

March 10, 1972) whereupon he entered a plea of not guilty. Thereafter, on July 17, 1972, the Circuit Court in and for Orange County, Florida, was convened and a jury was duly picked and sworn to try the Appellant for the first degree murder of Johnny Gentile. (R 233-234) On the following morning, July 18, 1972, the Court sua sponte determined that it did not have jurisdiction of the Appellant to try this matter whereupon this Court immediately ordered this case transferred to the Criminal Court of Record. (R 234) The Court released the jury (R 235) over the objection of the State (TM 21, July 17 and 18) without declaring a mistrial. (TM 26, 27, July 17 and 18)

From these aforementioned acts, Appellant would submit that former jeopardy had attached and Appellant's constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution

as well as Article 1, Section 9 of the Florida Constitution were violated by trying the Appellant for the same identical offense in the Criminal Court of Record for Orange County, Florida under Case No. 72-879.

In the landmark decision of Donaldson v. Sack, 265 So.2d 499, decided July 17, 1972, the Florida Supreme Court held that: "capital crimes" as previously known in Florida no longer existed, and that crimes previously included under this category would be tried by the various criminal courts of record. However, the opinion issued by the Florida Supreme Court on July 17, 1972, was clear in that Donaldson, supra, would not become final until July 24 at noon which was the latest time that a petition for re-hearing would be accepted by the Court.

In further clarifying the exact time when the Circuit Courts were divested of their power to try cases formerly cognizable

as "capital cases" the 2nd District Court of Appeals for the State of Florida in the case of Laster v. Stephenson, 268 So.2d 387 (2nd Dist. 1972) held that the Circuit Court properly had jurisdiction to try a first degree murder case on July 17, 1972 and that the Circuit Court's remand of the case on July 24 was premature.

It is well established that at any time a jury selected and sworn to try a criminal case, a discharge of the jury without the declaration of a mistrial, serves to discharge the defendant from further proceedings upon those identical charges. See State v. Lanier, 205 So.2d 671; State ex rel Hand v. Lane, 209 So.2d 873 (2nd District 1968).

Thus, the Honorable Claude E. Edwards, Judge of the Criminal Court of Record who had previously sat as the Judge of the Circuit Court in this matter erred in denying (R 89) Appellant's motion for discharge (R 30) as under the laws of the

State of Florida, the Appellant herein, Clark E. Thomas, was subject to immediate discharge after the release of the sworn jury in the Circuit Court case on July 18, 1972.

* * *

Exhibit II deleted

* * *

Exhibit III - Petition for Writ of Habeas Corpus deleted

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CLARK E. THOMAS,
#B-023775,

Petitioner,

vs.

No. 74-230-ORL-CIV-R

RAYMOND D MASSEY,
Superintendent,
Union Correctional
Institution,

Respondent.
_____/

O R D E R

This cause is before the Court on a petition for habeas corpus relief. Petitioner's claim for relief involves eight allegations.

The first allegation states that there was a violation of the fifth amendment protection against being placed in jeopardy twice for the same offense. Jeopardy does not attach until the accused is placed on trial in a court which has jurisdiction

to try the offense. United States v. Ball, 163 U.S. 662 (1896); United States v. Weissman, 434 F.2d 175 (8th Cir. 1970), cert. denied, 401 U.S. 982. The record shows that petitioner was not placed in jeopardy twice before a court that had jurisdiction to try the offense.

The second allegation . . .

* * *

For the foregoing reasons, it is

ORDERED that the petition for writ of habeas corpus is denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 15th day of January, 1975.

/s/ John A. Reed, Jr.
Judge

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

JULY TERM 1973

CLARK E. THOMAS, Appellant,	)	
v.	)	CASE NO. 72-1054
STATE OF FLORIDA, Appellee.	)	

Decision filed September 25, 1973.

Appeal from the Criminal Court of Record for Orange County; Claude R. Edwards, Judge.

Richard W. Aschenbrenner of Law Offices of Fred A. Jones, Jr., Miami, for appellant.

Robert L. Shevin, Attorney General, Tallahassee Thomas M. Carney, Nelson E. Bailey and Basil Diamond, Assistant Attorneys General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

OWEN, C.J., WALDEN and MAGER, JJ., concur.

SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

FRIDAY, FEBRUARY 22, 1974

CLARKE E. THOMAS, Petitioner,	)	CASE NO. 44,672
vs.	)	DISTRICT COURT OF APPEAL, FOURTH
STATE OF FLORIDA, Respondent.	)	DISTRICT 72-1054

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY,
ORLANDO, FLORIDA

CASE NUMBER 72-9

STATE OF FLORIDA,

Plaintiff,

vs.

CLARK E. THOMAS,

Defendant.
_____/

O R D E R

THIS CAUSE was pending in this Court on Grand Jury Indictment charging the defendant, CLARK E. THOMAS, with the crime of Murder in the First Degree and that said cause was set for trial by jury on July 17, 1972.

PRIOR to the commencement of the trial the defendant through his counsel made his objection to the jurisdiction of the Court based on a decision of the United States Supreme Court in Furman v. Georgia _____ U.S.

_____ (1972) and related cases pertaining to capital punishment and its effect on the jurisdiction of this Court to try capital cases.

THE COURT nevertheless proceeded to trial but on the 18th day of July, 1972, was advised of the opinion of the Supreme Court of Florida in Anthony Donalson v. Sack, filed July 17, 1972, by which it has been determined that the Circuit Court no longer has jurisdiction of the cause.

THE COURT thereupon discharged the Jury prior to the receipt of any evidence and directed in Open Court that the cause be transferred by the Clerk to the Criminal Court of Record of Orange County, Florida. The Court being otherwise advised in the premises, it is thereupon

ORDERED and ADJUDGED as follows:

1. That jurisdiction of the above entitled cause is vested in the Criminal

Court of Record of Orange County, Florida.

2. That the file in the cause, including all Pretrial Motions and Orders therein, Discovery Depositions and Witness Lists be and is hereby transferred to the Criminal Court of Record of Orange County, Florida.

/s/ Claude R. Edwards
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Robert G. Murrell, Esquire, Post Office Box 1748, Orlando, Florida 32802, this _____ day of June, 1978.

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Supreme Court, U. S.
FILED
AUG 17 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1709

CLARK E. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

REPLY BRIEF OF PETITIONER

ROBERT G. MURRELL
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Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1709

CLARK E. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

REPLY BRIEF OF PETITIONER

Petitioner seeks a Writ of Certiorari to the Supreme Court of Florida for violation of Constitutional Rights under the Fifth and Fourteenth Amendments where the Defendant was charged by Grand Jury indictment with first degree murder and proceeded to trial before a Circuit Court with a jury of twelve being impaneled and sworn, and discharged by the court without legal cause, the Defendant being thereafter subjected to double jeopardy when tried and convicted for the identical offense with six jurors before another court, the Criminal Court of Record.

WHETHER FEDERAL REVIEW IS CUT OFF BY RES JUDICATA WHERE THE STATE COURTS DECLINED TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES, PROPERLY RAISED, BUT NEVER CONSIDERED.

Respondent's position is intent on avoiding consideration of the petition on the merits by an untenable procedural argument claiming a decision on "state" issues.

In response to argument of *res judicata,* Rule 3.850, Florida Rules of Criminal Procedure, by its own terms, recognizes the right to petition and release, "upon the ground that the sentence was imposed in violation of the constitution or laws of the United States". Petitioner here seeks just such relief for violation of his federal constitutional rights by subjecting him to double jeopardy, in violation of the Federal Constitution.

The record discloses that Petitioner did attempt an appeal in 1972 with no federal issues determined. In 1975, Petitioner *in propria persona* filed his Rule 3.850 motion to vacate and set aside the judgment of sentence and conviction, raising the federal constitutional question of double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Upon denial, an appeal raising the federal constitutional question of double jeopardy was dismissed as frivolous and certiorari thereafter refused by the Florida Supreme Court. Each of the Florida courts presented with the claim of double jeopardy under the United States Constitution has refused to consider the matter.

Petitioner is not here arguing "state" grounds, but violation of the Petitioner's federal constitutional rights, and accordingly, Respondent's reliance on *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963) and *N.A.A.C.P.*

v. *Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958), involving "independent and adequate *state* grounds", is misplaced and faulty, not only because no "federal" issues purported to be decided by the appeal in the state court, but state procedure allows the federal constitutional issue not theretofore considered to be raised under Rule 3.850, Florida Rules of Criminal Procedure, just as was done in this case. In fact, in *Fay* v. *Noia,* supra, this court granted relief for double jeopardy where the same identical argument was made and rejected. The hornbook rule relied upon by Respondent applies to state substantive grounds, or procedural grounds, but in no way prevents consideration of the federal question in granting relief. This court observed "the fatal weakness of this contention" that *Noia's* defeat in state court would cut off review by the Supreme Court of the United States of the state proceedings which refused him relief. *N.A.A.C.P.* v. *Alabama,* supra, was an attempt in proceedings by the Attorney General of Alabama enjoining the N.A.A.C.P. from conducting further activities in that state and to produce its membership list. In granting relief, this court, in noting the hornbook rule, found that federal jurisdiction to review a judgment of a state court on a federal question is not defeated by the court's reliance on a non-federal ground which is without any value or substantial support.

Likewise, reliance on the Florida decisions of *Suarez* v. *State,* 220 So.2d 442 (3DCA Fla. 1969); and *Culberson* v. *State,* 224 So.2d 363 (2DCA Fla. 1969), declining to reconsider "state" issues, under Rule 3.850, where already fully determined on an earlier appeal, is unsupportive and no bar to this court granting relief for violation of the Petitioner's rights under the United States Constitution. The appeal, in 1972, with no federal issues considered or de-

termined, is consequentially not res judicata as to federal issues.

Nor did the Supreme Court of Florida, on appeal, sub judice, purport to express its view of federal law, so that *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945), relied upon by Respondent, has no application.

Respondent misconceives the doctrine of *res judicata,* which is ordinarily a defense to be asserted to bar a second prosecution under a new indictment for the same offense, even where the Defendant is not placed in jeopardy in the first prosecution. *United States* v. *Oppenheimer,* 242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 LRA 516. Also, see *Cousins* v. *Wigoda,* 419 U.S. 447, 42 L.Ed.2d 595, 95 S.Ct. 541 (1975) cited at page 10 by Respondent, recognizing "the defense of *res judicata*" to be "pleaded and proved (as an 'adequate *state* ground') in the state trial court."

Constitutional guarantees against double jeopardy do not have the effect of abrogating or supplanting in criminal cases the common law principle of *res judicata,* which is available as an additional defense. *United States* v. *Oppenheimer,* supra; *Collins* v. *Loisel,* 262 U.S. 426, 67 L.Ed. 1062, 43 S.Ct. 618; *United States* v. *Marakar,* 300 F.2d 513, vacated on other grounds 370 U.S. 723, 8 L.Ed.2d 802, 82 S.Ct. 1573. Clearly, each of the cases relied upon by Respondent, where state courts relied upon state issues "resolved on adequate *state* grounds", is clearly inapplicable to Petitioner's assertion of double jeopardy under the Federal Constitution as raised herein.

Nor is the Respondent's inclusion of the order of the United States District Court, Middle District of Florida, denying Petitioner's Application for Writ of Habeas Corpus (Brief of Respondent, page 1; Appendix, pages 14-

15), more than an attempt to cloud the issue, to mislead, and prejudice Petitioner in the consideration of his assertion of double jeopardy. Such habeas corpus proceedings were no proper part of any state record below, nor could they properly be considered. *Res judicata* is not applicable in habeas corpus proceedings. *Sanders* v. *United States,* 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068; *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822; *Barrett* v. *Hunter,* (CA10 Kan) 180 F.2d 510, 20 ALR 2d 965, cert. den. 340 U.S. 897, 95 L.Ed. 650, 71 S.Ct. 234; *United States ex rel. Bergdoll* v. *Drum,* (CA2 NY) 107 F.2d 897, 129 ALR 1165, cert. den. 319 U.S. 648, 84 L.Ed. 1414, 60 S.Ct. 1098.[1]

Moreover, the habeas corpus order shows no evidence taken but that the ruling is based on the erroneous conclusion that the Circuit Court did not have jurisdiction. If res judicata is inapplicable to habeas corpus proceedings which could be hereafter sustained to present the identical question on the merits to this court, then Respondent's procedural argument to avoid consideration on the merits is without substance.

The very purpose of Rule 3.850, Florida Rules of Criminal Procedure was to permit a prisoner to raise violation of constitutional rights when no other procedural

---

1. In the Federal Court, no Judge is "required" to entertain an application for habeas corpus by a federal prisoner where the legality of the detention complained of has been determined by a Federal Judge on prior application, 28 U.S. Code, Section 224(a), the granting of the writ being discretionary in any event. However, res judicata not being applicable to habeas corpus, the court is always vested with discretion in disposing of subsequent applications for relief, even though there has been a prior refusal to discharge on a like application. Moreover a prior determination on the merits is deemed made only if an evidentiary hearing was held. *Sanders* v. *United States,* 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068. Thus, even a refusal of the Supreme Court of the United States to issue a writ of habeas corpus, being discretionary, is not an adjudication on the merits and is without prejudice to an application to any other court for the relief sought. *Ex parte Abernathy,* 320 U.S. 219, 88 L.Ed. 3, 64 S.Ct. 13.

remedy was available. Thus, Petitioner contends the Florida Supreme Court has refused, as did the District Court of Appeal, Fourth District, and the trial judge, to consider a federal question of substance, raised by Petitioner under Rule 3.850, viz.: Was the Petitioner subjected to double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

CONSIDERATION ON THE MERITS OF PETITIONER'S CLAIM OF DOUBLE JEOPARDY.

In consideration of the Petition for Certiorari on its merits, the issue is whether Petitioner was placed twice in jeopardy for the same offense. Respondent argues (1) that if Petitioner's counsel did not object to the discharge of the jury by the Circuit Court, (2) that in some mysterious fashion, *Furman* v. *Georgia*, 1972, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, caused the Circuit Court to lose jurisdiction contrary to *Donaldson* v. *Sack*, 265 So.2d 499, and *Laster* v. *Stephenson*, 268 So.2d 387, and that double jeopardy would not attach (3) because, "in the instant case, the trial judge stopped the trial before any testimony was taken and transferred the case", and (4) if there was no prosecutorial or judicial over-reaching, that Petitioner should be denied relief even if there was double jeopardy otherwise.

Numerous already cited cases attest to the proposition, as has been repeatedly stated, that in a jury case jeopardy attaches when a jury has been impaneled and sworn. In the recent case of *Crist, Warden, et al.* v. *Bretz et al.*, Case No. 76-1200, argued November 1, 1977, reargued March 22, 1978, and decided by this court on June 14, 1978, this court in denying certiorari, put to rest any question as to when jeopardy attaches in a jury trial, and

confirmed that federal, not state, law determines the issue of double jeopardy. Senior Judge Elbert P. Tuttle of the Fifth Circuit, sitting by designation for the Ninth Circuit in *Bretz* v. *Crist*, 546 F.2d 1336 (1976), concluded:

> "On the same day that the trial court dismissed the first information, the state filed a second two-count information. Count I accused the appellants of grand larceny, and tracked the language of Count I of the original information. * * * A new jury was impaneled, appellants' motion to dismiss on grounds that the prosecution placed them twice in jeopardy was denied, and appellants were found guilty. * * * After exhausting available state postconviction remedies, appellants sought and were denied habeas corpus relief by the district court." * * *
>
> "* * * In *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969), however, the Supreme Court eschewed Palko's 'approach to basic constitutional rights,' and found 'that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment'." * * *
>
> "* * * Relying on federal precedents, the *Benton* court held that . . . the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795, 89 S.Ct. at 2063.
>
> "* * * But if the federal rule—that jeopardy attaches when a jury is impaneled and sworn, e.g., *Downum* v. *United States*, 372 U.S. 734, 735-36, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)—is of constitutional dimension, then jeopardy attached at the first trial and unless the mistrial declaration was consonant with the 'mani-

fest necessity' doctrine . . . the second trial was constitutionally impermissible." * * *

"(2) We reject at the outset the notion that while the double jeopardy clause constrains reprosecutions by the states, it countenances different constitutional applications in state and federal courts. * * * Each time the due process clause of the Fourteenth Amendment has been interpreted to encompass a particular guarantee of the Bill of Rights, the Court has explicitly reaffirmed the proposition that the same constitutional norms are to be employed in assessing the conduct of state and federal authorities. * * * *Benton's* declaration that 'the same constitutional (double jeopardy) standards apply against both the State and Federal Governments', *Benton* v. *Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), and its determination that 'the validity of (state) larceny conviction(s) must be judged . . . under this Court's interpretations of the Fifth Amendment double jeopardy provision.' 395 U.S. at 796, 89 S.Ct. at 2063, compel the conclusion that if the federal attachment of jeopardy rule is constitutionally mandated in federal courts, no different rule may be followed by state courts."

"(3) We hold that the attachment of jeopardy rule applied in *Downum*, *Somerville* and *Serfass* is a constitutional requirement of the Fifth Amendment which is binding on the states as well as the federal government. The rule itself serves as the lynchpin for all double jeopardy jurisprudence." * * *

"* * * Judge Harlan writing for the Court in *United States* v. *Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), clearly indicated the constitutional stature of the rule: 'the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that

the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings.' 400 U.S. at 480, 91 S.Ct. at 555." * * *

"The Supreme Court has consistently applied the federal attachment of jeopardy rule to state cases." * * *

"*Breed* v. *Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975), resolves any doubt that federal standards determine when jeopardy attaches." * * *

Although the Respondent is concerned with whether or not the actions of the trial judge in discharging the jury sua sponte, without motion, and without declaring a mistrial, were "a proper exercise of the trial court's discretion", clearly there was not "manifest necessity", *Downum* v. *U. S.*, 1963, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100; *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 597, 6 L.Ed. 165, or "imperious necessity", *Wade* v. *Hunter*, 1949, 336 U.S. 684, 69 S.Ct. 834, 92 L.Ed. 974; *United States* v. *Perez*, supra. Clearly, the Circuit Court has jurisdiction and should have proceeded with the trial, *Furman* v. *Georgia*, supra, taking away no substantive rights of the Defendant, but merely declaring that the punishment or penalty of death upon conviction could not be imposed under a statute similar to that in Florida where the jury had discretion without guidelines to determine the imposition of the death penalty. As pointed out in *Laster* v. *Stephenson*, supra, the Circuit Court has jurisdiction to complete the trial, and the adjudication of guilt or innocence was not thereby affected by *Furman* or *Donaldson*, only the maximum sentence which could be imposed. The trial judge committed error in discharging the jury, thereby effectively acquitting the Defendant of the charges, with the result that the second trial constituted double

jeopardy. His action was similar to that of the judge in *United States* v. *Jorn*, 1971, 400 U.S. 740, 91 S.Ct. 547, 27 L.Ed.2d 543, where the Supreme Court found double jeopardy in discharging the jury and declaring a mistrial, finding that such arbitrary action of the trial judge could not support a finding of "manifest necessity".

Whereas Respondent contends that the action in discharging the jury was "not occasioned by prosecutorial or judicial over-reaching", the record discloses that, on objection of the Defendant's attorney, on the basis of *Furman*, the trial judge directly ruled that the Circuit Court had jurisdiction to proceed with the trial on July 17, 1972, as otherwise there would never have been a jury sworn and impaneled to try the case. Upon thereafter learning of the ruling in *Donaldson* v. *Sack*, supra, the judge sua sponte, without motion, discharged the jury over objection. Defendant's attorney had objected prior to trial to proceeding on the basis of the decision of the Supreme Court in *Furman*, but the trial judge discharged the jury because of *Donaldson* v. *Sack*, in the absence of any pending motions before the court. At the time that the Circuit Court judge discharged the twelve-man jury on July 17, 1972 he committed an error of law, because the Circuit Court had jurisdiction through July 24, 1972.

Moreover, on July 17, 1972, the Defendant had certain substantive rights through indictment by grand jury, and trial before a twelve-man jury before the Circuit Court. It will be noted that the Defendant alone was placed on trial before the Circuit Court. Thereafter, when the case proceeded on the second trial in the Criminal Court of Record, the Defendant was charged by direct information with a co-defendant, and not only was deprived of the right to indictment by grand jury, but was also subjected to trial before a jury of only six, along with the co-defendant, with a severance being denied. The evidence presented against the co-defendant at the second trial could not have been presented in the Circuit Court at the first trial, because the co-defendant could not have been called as a witness without granting immunity so that he would not have been a co-defendant at the second trial. In the Circuit Court, Petitioner's trial began on July 17, 1972; the co-defendant's trial was not scheduled until a later date.

No actions of Petitioner or his counsel were in any way responsible for, or caused, the discharge of the jury in Circuit Court. The Petitioner was not only subjected to double jeopardy in the second trial for the same offense, and lost the right to a grand jury indictment and a separate trial before a twelve-man jury, but was subjected to a trial before a six-man jury with a co-defendant upon information filed by the prosecutor.

Bretz v. *Crist*, supra, cert. den. by this court as recently as June 14, 1978, puts to rest the Respondent's contentions that if cessation of the first trial was "occasioned by prosecutorial or judicial over-reaching", that a retrial was not barred by principles of double jeopardy. Judge Tuttle in that decision observed:

> "* * * in *Smith* v. *Mississippi*, 478 F.2d 88, 93 (5th Cir.), cert. denied, 414 U.S. 1113, 94 S.Ct. 844, 38 L.Ed.2d 740 (1973), the Fifth Circuit analyzed the double jeopardy claim of a state prisoner as follows:
>
> > 'the (state's) contention that petitioner was not "put to trial" or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in Downum . . . and . . . Somerville . . . in both cases the Supreme Court held that

jeopardy attached when the first jury was selected and sworn. * * *' "

"The attachment of jeopardy rule addresses different concerns: (1) protecting the accused from the financial, physical and psychological enervation worked by repetitive prosecutions; and (2) preserving the accused's 'valued right to have his trial completed by a particular tribunal', . . . *independent of the threat of bad-faith conduct* by judge or prosecutor. We decline to substitute a contradictory state rule of the Supreme Court's judgment that these concerns reach constitutional critical mass when the jury is impaneled and sworn. * * *"

"* * * the Supreme Court has consistently recognized a major purpose of the double jeopardy clause as the protection of a defendant's 'valued right to have his trial completed by a particular tribunal,' *Wade* v. *Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949); accord, *United States* v. *Dinitz*, 424 U.S. 600, 603-607, 96 S.Ct. 1075, 1078-1080, 47 L.Ed.2d 267 (1976); *Illinois* v. *Somerville*, 410 U.S. 458, 469-71, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973): *United States* v. *Jorn*, 400 U.S. 470, 484-85, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Downum* v. *United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). * * *"

CONCLUSION

The Petitioner was subjected to double jeopardy in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution, and certiorari should be granted.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by mail to Robert L. Shevin, Attorney General of Florida, Kenneth G. Spillias, Assistant Attorney General of Florida and Joy B. Shearer, Assistant Attorney General of Florida, 225 Pan American Building, West Palm Beach, Florida 33401, Counsel for Respondent, this 16th day of August, 1978.

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